Supreme Court, U. S.
FILED
APR 4 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1366

ST. PAUL MERCURY INSURANCE COMPANY, INDEMNITY MARINE ASSURANCE CO., LTD., and AMERICAN MOTORISTS INSURANCE COMPANY, *Petitioners,*

v.

EAST WEST TOWING, INC., ET AL, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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STATEMENT OF THE CASE

The Respondents are generally in agreement with Petitioners' statement of the case with the following exceptions:

1. The warranty of continuing ownership quoted on page 3 was not the one in the policy applicable to the Tug MISS CAROLYN. The applicable warranty did not require "previous" consent;

2. The statement that the choice of law was crucial is inaccurate in that the issue is not crucial since the outcome of the case would be the same regardless of the

choice of law, as will appear from Respondents' argument (page 4);

3. Respondents do not agree with Petitioners' assertions as to what the applicable rule of Louisiana law is under the facts of this case. As will appear from Respondents' argument, the appropriate point in time for transfer of title under Louisiana law was at the time of delivery. Nor do Respondents agree with Petitioners' footnote on the District Court's interpretation of Louisiana law (page 5), but rather asserts the Florida District Court was imminently correct, the Fifth Circuit Court of Appeals did reach that point and affirmed;

4. Respondents cannot agree with Petitioners' last paragraph in the Statement of the Case because it does not square with the actions of the District Court or the issues of the case.

The Petitioners were the insurors of East West Towing Company and insured the Tug Boat MISS CAROLYN. The insuror sought to avoid liability to its insured by asserting a transfer of the vessel had occurred prior to the negligent acts causing the loss. The Petitioners have raised in their petition points relating to the choice-of-law rule and the substantive law applied which had the effect in this case of defeating Petitioners' contentions as to when title passed to the Tug, as between East West and E & I, Inc.

ARGUMENT

Before responding directly to Petitioners' "questions presented," these Respondents would first urge that the petition should be denied because it is frivolous. It is frivolous because the points raised, even if valid, would not alter the result below since there are

valid alternate reasons to sustain the District Court. Bases for the decision in the District Court not here under attack are dispositive of the case.

A. The Petition Should Be Denied Because Grounds Exist Independent Of Points Raised By Petitioners That Sustain The Result Below.

1. THE PETITIONERS' POLICY OF INSURANCE WAS NOT AVOIDED EVEN IF TITLE PASSED AT THE TIME OF THE CLOSING BECAUSE THE DISTRICT COURT FOUND THE TRANSFER OF THE TUG WAS WITH THE ASSENT OF PETITIONERS AND NOT IN CONTRAVENTION OF THE POLICY PROVISIONS.

In the Court's findings of fact under *insurance questions,* (page C-13 of the Petitioners' Appendix), the District Court refers to the testimony of the Petitioners' insured, Mr. Buras of East West Towing, who stated that he discussed the whole matter of the transaction involving the MISS CAROLYN with the Petitioners' issuing agent. The agent assured Mr. Buras that he would take care of it. Subsequently Endorsements § 26 and § 27 were issued and the MISS CAROLYN was not deleted from the policy until an effective date of August 21, 1973, after the accident. These Endorsements were dated September 19, 1973.

The Petitioners attempted to escape liability on their policy by an application of a Louisiana Civil Code provision that title passed under execution of the sale agreement in New Orleans before the accident. The District Court determined, however, that there was no transfer of ownership within the meaning of the policy by applying the Florida Uniform Commercial Code,

§ 672.401(2) Fla. Stat. to determine the point in time of the transfer of title. The Court also went on to state:

> "The Court further finds that there was written assent to the change of ownership by virture of Endorsements § 26 and § 27 issued on policy number GSD 1100, which deleted the Tug MISS CAROLYN from the policy of insurance effective August 25, 1973, after the collison occurred and after ownership had changed and with full knowledge of these events. The policy provisions do not require the assent to be prior to the change in ownership or management." *S.C. Loveland, Inc.* v. *East West Towing, Inc.*, 415 F.Supp. 596, 624. Petitioners' Appendix C-30.

This finding was specifically affirmed by the Fifth Circuit Court of Appeals.

A finding that the insurance companies were liable on their policies can be substantiated on this ground alone. The same result would obtain in this case even if the Court were to apply the Louisiana substantive law as urged by Petitioners to the end that title passed upon the signing of the contract because the transfer, whenever made, was with the underwriter's written assent.

2. UNDER LOUISIANA CONTRACT LAW TRANSFER OF OWNERSHIP WAS SUSPENDED BY THE PARTIES UNTIL DELIVERY OF THE TUG IN TAMPA.

Further, even if the Court were to apply Louisiana law, the result would be the same. The District Court determined that the Louisiana law permits the time of title passing provided in Article 2456, Louisiana Civil Code to be modified by the intentions of the parties.

The Louisiana Civil Code provides for the suspension of the passage of title by a suspensive condition. The Court found that it was the intent of the parties that the vessel remain the property of East West until its obligations to the Loveland tow were completed. The District Court concluded correctly that under Louisiana law, title passed after the negligent acts at the time delivery of the tug was made in Tampa.

Petitioners assert in a footnote in its Petition at page 5 that the District Court had misinterpreted the Louisiana Civil Code, and state therefore it would be necessary to remand this to the Court of Appeals to review the ruling of the trial court in this regard.

The Fifth Circuit Court of Appeals did not discuss this particular ruling in its decision, but did made this statement:

> "The District Court's conclusions of law, for the most part, also comport with our conclusions. We therefore adopt Judge Roettger's opinion as our opinion on appeal with one modification." *S.C. Loveland* v. *East West Towing,* _____ F.2d _____ (5th Cir. 1979) Slip Sheet Opinion at 1636 (Petitioners' App. A2).

The modification related to applicability of the admiralty choice-of-law rule to the sale of a vessel. The District Court's Conclusion of Law as to Louisiana law was, therefore, adopted by the Fifth Circuit.

The Petitioners assert Article 2456 of the Louisiana Civil Code as if it were dispositive of this case. This is not so. Article § 2457 states that a sale may be made purely and simply or under a condition either suspensive or resolutive. If the contract is made pure and simple, then Article 2456 would control passage of title, but the

parties are permitted to make a contract subject to conditions. Article 2471 provides:

> "A sale, made with a suspensive condition, does not transfer the property to the buyer, until the fulfillment of the condition." Article 2471 La. Civ. Code, 10 L.S.A. 246.

The suspensive condition in Louisiana law is equivalent to the condition precedent of common law. *City of New Orleans* v. *Texas P.Ry. Co.*, 171 U.S. 312, 18 S. Ct. 875, 43 L. Ed. 178 (1898); *Cornell* v. *Insurance Company*, 3 Mart. N.S. 223 (La. S. Ct.).

Parties to the sale of an automobile may agree to suspend passage of title until the transaction is approved by a finance company and in such cases a title does not pass until such approval is given. *Jackson Motors, Inc.* v. *Calvert Fire Insurance Company*, 239 La. 921, 239 So.2d 478. *See also, Canal Motors, Inc.* v. *Campbell*, 241 So.2d 5 (La. App. 1970); 269 So.2d 847 (La.App. 1972). Where a contract for the sale of an automobile was subject to a suspensive condition, the liability insuror of the dealership was held to have coverage for an accident after delivery to the buyer because ownership had not passed and its insured was still owner. *Kershaw* v. *Deshotel*, 179 So.2d 528 (La. App. 1965); *Suire* v. *Travelers Indemnity Co.*, 179 So.2d 532 (La. App. 1965). The similarity to the present case is striking; the seller's insurance coverage continues until the suspensive condition is satisfied under Louisiana law.

Since it was the agreement of the parties that E. & I. would not be involved with the tow; that the tow would be carried out by East West, it was the intention of the parties that the transfer of title of the tug MISS CAROLYN be suspended until such time as the tug had

reached Tampa and completed its portion of the tow of the barge LOVELAND 34.

Even if the choice-of-law rule Petitioners seek is used to make applicable the substantive law sought by Petitioners, the result reached below would be exactly as it was. Therefore, the issues raised by the Petitioners do not actually relate to a viable, justiciable contest. For this reason alone, the Petition should be denied.

PETITIONERS' QUESTIONS PRESENTED

1. **Whether, In A Case Transferred Pursuant To 28 U.S.C. § 1404, Application Of The Conflict Of Laws Rules Of The Transferee State Rather Than That Of The Transferor State Conflicts With The Decision Of This Court In *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964).**

2. **Whether State Conflict Of Laws Or Federal Admiralty Conflicts Rules Govern The Choice-Of-Law Issues In A Controversy Arising Out Of A Contract Of Marine Insurance.**

RESPONDENT E & I INC.'S RESTATEMENT OF AND REPLY TO QUESTIONS PRESENTED BY PETITIONERS.

Point I

There Is No Conflict With *Van Dusen* v. *Barrack* Because The Transferee Court Actually Applied The Choice Of Law Rule Of The Transferor State, Louisiana.

Point II

There Is No Real Question As To The Application Of State Or Admiralty Choice Of Law Rules Because As To The Issue Of Transfer Of Title To Personalty The Rule Is The Same.

Point I

There Is No Conflict With *Van Dusen* v. *Barrack* Because The Transferee Court Actually Applied The Choice Of Law Rule Of The Transferor State, Louisiana

Petitioners assert first that the decision of the Fifth Circuit Court of Appeals conflicts with this Court's decision in *Van Dusen* v. *Barrack,* 376 U.S. 612 (1964). In support of its contention that there is a conflict, the Petitioners asserts, first, that the cited case entitles them to the choice-of-law rule of the forum at the situs of the filing of the action which was the Eastern District of Louisiana (transferor court). It is then asserted by Petitioners that the District Court for the Southern District of Florida (transferee court) refused to apply the Louisiana choice-of-law rule as is required by *Van Dusen* v. *Barrack, supra,* and that this refusal was affirmed by the Fifth Circuit Court of Appeals. The Petitioners assert: "Accordingly, the decision of the Court of Appeals to apply Florida law is in direct conflict with this Court's *Van Dusen* decision." (Petition p. 8).

In order to make out this conflict it is necessary for the Petitioners to make assertions about actions of the Court's below which are simply not accurate. It was the decision of the District Court, affirmed by the Fifth Circuit, to apply Florida *substantive* law, not the Florida choice-of-law rule. The choice of Florida substantive law

was the result of the use of a choice-of-law rule which is not only *consistent* with, but also the same as, the Louisiana choice-of-law rule.

What the District Court did was to apply what it stated to be a *universally* recognized choice-of-law rule. The trial court stated:

> "In determining a question concerning the validity and effect of a transfer of title in personalty, the universally recognized conflicts law is that of lex rei sitae or the law of the place of the situs of the personalty. *See U.S.* v. *Guaranty Trust Co.,* 293 U.S. 340, 55 S. Ct. 221, 79 L. Ed. 415 (1934) *Frick* v. *Commonwealth of Pennsylvania,* 268 U.S. 473, 45 S. Ct. 603, 69 L. Ed. 1058 (1925)." *S.C. Loveland* v. *East West, et al, etc.,* 415 F. Supp. 596, 610. Petitioners' Appendix C-27.

The Court of Appeals, in passing upon this ruling by the trial court, stated:

> "The District Court ultimately applied Florida law, concluding that in determining the validity and effect of a transfer of title in personalty, the universally recognized conflict law is that of lex rei sitae or the law of the place of the situs of the personalty governs. The Circuit Court of Appeals approved the application of this universally recognized conflict rule by the trial court and stated it to be firmly grounded in reason and authority . . ." *S.C. Loveland, Inc.* v. *East West Towing, Inc., etc.,* _____ F.2d _____ (5th Cir. 1979). Slip Sheet Opinion at 1638. Petitioners' Appendix, A-4 and A-5.

When the Court applies a choice-of-law rule which referred to it as universally accepted, it would appear that the Court has taken the view that it was applying a conflict rule which all jurisdictions would apply, including Louisiana, Federal or Admiralty and/or Florida.

The Petitioners complain about the Court's failure to apply the choice-of-law rule from Louisiana, however, Petitioners do not state to this Court what the Louisiana rule is, and fails to demonstrate that the rule of Louisiana is such that it is contrary to that applied by the District Court.

The Louisiana choice-of-law rule is found in the Louisiana Civil Code in Article X, Chapter 3 "Of The Effects of Laws."

> "Article X. The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed.
>
> But, the effect of acts passed in one country to have effect in another country, is regulated by the laws of the country where such acts are to have effect."—Article 10, La.Civ.Code. 1 LSA 243

The first paragraph of Article X applies to the rule of *lex loci contractus.* However, where the agreement is made to have effect in another jurisdiction, the Louisiana choice-of-law rule is that the law of the country (or jurisdiction) where the acts are to have effect controls the contract.

Since the evidence establishes that the owners of the tug had sent the tug to Florida before the date of the contract of sale of the tug, the parties were clearly engaging in an "act" that was to have effect in Florida.

In the case of *Matney* v. *Blue Ribbon,* 12 So.2d 249 (La. App. 1942), the Second Circuit Court of Appeals of Louisiana was dealing with the selection of law in a tort case. The analogy, however, was made that a tort action is a chose in action or personal right of property and the argument was made that the laws of the

domicile of the person was the rule to be enforced in Louisiana. The Court rejected that assertion and made the following statement:

> "15 C.J.S., See Conflicts of Laws, Section 18, page 930, states the following rule; "The modern rule that the law of the actual situs governs the validity of a transfer of movable property rests on the fundamental proposition that every country has the right to subject all property within its jurisdiction to the control and regulations of its laws. *Pullman Palace Car Company* v. *Commonwealth of Pa.,* 11 S. Ct. 876, 141 U.S. 18, 35 L. Ed. 613, 616." *Matney* v. *Blue Ribbon, Inc., supra,* at _____. Affirmed *Matney* v. *Blue Ribbon, Inc., et al,* 202 La. 505, 12 So.2d 253 (La. 1942).[1]

In the case of *F.J. DeMary* v. *Louis Fontenot,* 161 So.2d 82 (La. App. 1964) Writ refused 246 La. 87, 163 So.2d 360 (1964), a contract was entered into in Orange, Texas to "sell, transfer, assign and deliver" six horses. The action for the purchase price was brought in Louisiana and the plaintiff asserted his vendor's privilege be maintained against the property.

One of the defenses raised was that an agreement for the sale of race horses should not be enforced because racing horses was illegal in Texas and that the contract was entered into in Texas and should be

[1]The District Court quoted Mr. Justice Story as follows:

> " 'A nation within whose teritory any personal property is actually situate has an entire dominion over it while therein . . . . It may regulate its transfer . . . to the same extent that it may exert its authority over immovable property.' Story, CONFLICTS OF LAWS, § 550, cited in *Frick* v. *Commonwealth of Pennsylvania, supra,* 268 U.S. at 493, 45 S.Ct. at 606, 69 L.Ed. at 1064." *S.C. Loveland* v. *East West Towing,* 415 F.Supp. 596, 611. Petitioners' Appendix C- .

From the similarity of the quoted rule it appears the District Court is on the same course as the Louisiana Court.

governed by Texas law. The court held that it was the clear intentions of the parties that the agreement was to have effect in the State of Louisiana where horse racing was legal and stated the Louisiana rule:

> "In Louisiana, the rule has been generally stated to be that the law of the place where the contract is to have effect determines the rights and obligations of the parties." *F. J. DeMary* v. *Louis Fontenot, supra,* at 83.

Universal CIT Credit Corporation v. *Shulet,* 151 So.2d 705 (La. App. 1963), was cited and quoted as the authority for that rule as well as Louisiana Civil Code, Article X.

In *Universal CIT Credit Corporation* v. *Shulet,* 151 So.2d 705 (La. App. 1963), the court had before it a situation where an automobile was sold in Indiana under a conditional sales contract with the intention that the vehicle be brought to and used in Louisiana. The vehicle was repossessed in Louisiana and the question arose as to whether or not the Louisiana law which forbid deficiency judgments should be applied. The court applied the rule that where the contract is to have effect in Louisiana, Louisiana law would apply.

Therefore, under the Louisiana Rule where a contract is entered into in Louisiana but is to have effect in Florida, the Louisiana choice-of-law rule would apply Florida substantive law.

Therefore, the application of the principle of *lex rei sitae* is wholely consistent with Louisiana Law and was the proper choice-of-law rule to be applied in the transferee court.

Point II

There Is No Real Question As To The Application Of State Or Admiralty Choice Of Law Rules Because As To The Issue Of Transfer Of Title To Personalty The Rule Is The Same.

The Petitioners' second reason for seeking the Writ is the assertion that the issue of whether state or federal conflicts of law rules govern a dispute arising out of a contract of marine insurance is an important issue of federal law which should be settled by this Court's intervention. Throughout that portion of the presentation, the Petitioners suggest that the Court erred in refusing to apply the admiralty choice-of-law rule of *lex loci contractus.* The District Court considered the admiralty rule of *lex loci contractus,* but then stated that the nature of the issue before it was the transfer of personalty, and that the universally accepted conflicts rule with regard to that issue was *lex rei sitae.* The Petitioners have failed to demonstrate that the application of *lex rei sitae* was incorrect in an admiralty forum as the choice-of-law rule.

The District Court, cites the case of *U.S.* v. *Guaranty Trust Company,* 293 U.S. 340 (1934). In that case, the government brought suit against Guaranty Trust Company with regard to a check issued in the District of Columbia to a man who was a resident of Yugoslavia and mailed it to him in Yugoslavia. It is alleged that at the time the check was negotiated in Yugoslavia, the endorsement of the payee was a forgery. Under the law of the District of Columbia the forgery would not have given the bank any interest in the check. The Court discussed the law of the District of Columbia and then stated:

> "But under settled principles of conflicts of laws, adopted by both federal and state courts, the validi-

> ty of a transfer of a chattel brought into a country by the consent of the owner is governed by its law: and that rule applies to negotiable instruments. (Citations omitted.)" 293 *U.S.* v. *Guaranty Trust Co.,* 340, 345-346.

The Court went on to hold that since the check was made payable to a resident of Yugoslavia and mailed to that country, the government intended it to be negotiated there and in accordance with the law of that country.

It would appear here that the sellers of the tug MISS CAROLYN, sent the tug on a tow from New Orleans into the State of Florida to deliver a barge in Jacksonville, Florida. The vessel was located at Panama City, Florida at the time the parties got together to contract with regard to the transfer of the vessel. Therefore a ruling that it was the intentions of the parties that the transfer be governed by the law of Florida is not only appropriate but exactly the result reached by the District Court and was the proper result, according to *U.S.* v. *Guaranty Trust Company, supra.*

CONCLUSION

It appears that the Petition undertakes to create issues which do not exist by asserting action in the lower courts which were not taken, and further asks this Court to reverse rulings below even though the same results would obtain. The Petition should be denied.

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